Supreme Court, U.S.
FILED

011834 JUN 11 2002

OFFICE OF THE CLERK

No.

IN THE

SUPREME COURT OF THE UNITED STATES
October Term, 2002

◆

ANDREW C. SCHIFFER,
Petitioner,

vs.

VILLAGE OF HASTINGS-ON-HUDSON, HASTINGS-ON-HUDSON POLICE DEPARTMENT, COUNTY OF WESTCHESTER, POLICE OFFICERS RICK WHITE, ANDREW HAYDEN, WAYNE PIETROPOLO, DAVID DOSHIN, DISH, O'SULLIVAN, OTHERS as of yet unknown, included as John/Jane Does Numbered 1 to 10 individually,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

ANDREW C. SCHIFFER, *Pro Se*
ROUTE 8, PO BOX 503
Speculator, NY 12164
518 548-6360

Jun 10, 2002

37pgs

Questions Presented

1 The Constitution does not make conspiracy a civil [or criminal] right (*Dennis* v. *US*, 1951, 341 US 494). Yet, the Constitution is not violated if two policemen see a rape [a crime] and watch it just for their own amusement (*DeShaney* v. *Winnebago County*, 1989, 489 US 189). Such Constitutional, legal and judicial as human values (*ethos*) are the root *cause* and *effect* of pain and suffering (*pathos*): *unequally* protecting the violators/conspirators (ab)using the courts as safe-havens and violated/deprived as scapegoats.

Is conspiracy *against* the man *stopping* a *beating* in this case in conflict with *Dennis* Constitutionalized lawlessness (or lawfulness) under manifestly *unequal* protection of laws justified by conspiracy *for* the man *raping* a woman and thus *for* the father *beating* a baby in *DeShaney*: the 1989 landmark?

2 A society, that empowers Judges to decide the fate of human beings and disposition of property, has the right to insist upon the highest level of judicial honesty and integrity (*Matter of Mazzei* v. *State Commission on Judicial Conduct*, 1993, Ct. App., 81 NY2d 568).

May it please the Court to invoke its *dormant* innate *ethos*, outlaw *pathos* Constitutionalized in *DeShaney*, ensure *equal* protection of laws and protect, from violators/conspirators as abusers, the courts being (ab)used as safe-havens and the violated/deprived as scapegoats?

LIST OF PARTIES

The names of all parties appear in the caption.

TABLE OF AUTHORITIES

CASES	Page
Bolden v. *State*, 410 A2d 1085, 1091	12-13
Dennis v. *US*, 1951, 341 US 494	i, 10, 28
DeShaney v. *Winnebago County*, 1989, 489 US 189	i, 10, 18
Garcia v. *Silverman*, 1972, 70 Misc. 2d 537-38 (Civil Ct. N.Y.Co.)	9-10
Jackson v. *City of Joliet*, 1983, 715 F2d 1200, 1202-03 (7th Cir.)	10, 17-18
Matter of Berkowitz v. *Arbib & Houlberg*, 1921, 230 NY 261 (**Cardozo, J., Ct App**)	14
Matter of Mazzei v. *State Comm. on Judicial Conduct*, 1993, Ct. App., 81 NY2d 568	i, 27
Muller v. *Oregon*, 1908, 208 US 412, 421	15-16
People v. *Charles Schweinler Press*, 1915, 214 NY 395, 401 (**Ct. App., Cardozo J.**)	16-17
Sato v. *Plunkett*, 1994, 154 F.R.D. 189 (N.D.,Ill.)	9
Town of Orangetown v. *Magee*, 1996, 88 NY2d 41, 48-49, 49-50, 52- 53 (**Ct. App**)	24-25

Wagner v. International Ry. Co., 1921, 232 NY 176 (**Cardozo, J., Ct. App., Hiscock, Ch. J.**, also concurring; *unanimous*) 17

STATUTES AND RULES 1-7

US Const, Preamble 1-2, 26

US Const, Art. VI, cl. 2 2, 13

US Const., Art. VI, cl. 3 2, 13-14

US Const., Amend. 1 2, 24

US Const., Amend. 2 2, 24

US Const., Amend. 4 3, 19

US Const., Amend. 5 3, 19

US Const., Amend. 8 3, 19, 21

US Const., Amend. 9 3, 26

US Const., Amend. 10 3, 26

US Const., Amend. 13 3, 20

US Const., Amend. 14 4, 21

US Const., Amend. 19 4, 18

US Const., Amend. 26 4, 18

42 U.S.C. § 1981	4-5, 22
42 U.S.C. § 1982	5, 22
42 U.S.C. § 1983	5, 22-23
42 U.S.C. § 1985	5-6, 23
NY State Const., Art. XIII, § 1	6-7, 14

OTHER

Conspiracy, *Bl. Dict.* (6th ed.), p. 309-310	12
Cardozo, Benjamin N., *The Nature of the Judicial Process* (1921 *Classic*), 1991 Paperback Ed., p.21	14
Model Penal Code, § 5.03: *Bl. Dict.*, 6th ed., p. 310	14
Rape Statistics: www.rainn.org/statistics.html	11
The U. S. Constitution, And Fascinating Facts About It, FOREWORD, 1st Ed., 1993, © Oak Publishing Company, ISBN 1-881473-21-X	19-20

TABLE OF CONTENTS

	Page
Questions Presented	i
List of Parties	ii
Table of Authorities	iii
Petition for Writ of Certiorari	1-27
Opinions Below	1
Jurisdiction	1
Constitutional and Statutory Provisions Involved	1
Statement of the Case	7
A. Statement of Material Facts	7
B. Stage in the Proceedings at which Federal Questions were Raised	8
Reasons for Allowing the Writ	8
The One and Only Reason to Allow the Writ: The "*Pathos* as *Ethos*" Constitutionalized as Textbook Law thus Human Value in *DeShaney* and thus also in this case too is both an *Unequal* Protection of the Laws and Public Policies and also in Conflict with both *Dennis* and *Jackson*	10

Conclusion 27

INDEX TO APPENDICES 1a-30a

A Mar 14, 2002 Summary Order: United States Court of Appeals, Second Circuit 1a

B May 17, 2001 Judgment: United States District Court, Southern District of New York 2a

C May 16, 2001 Memorandum Decision and Order: United States District Court, Southern District of New York 5a

D Nov 2, 1988 Oral Arguments and Questioning in the Landmark *DeShaney* v. *Winnebago County Department of Social Services* Case: Relevant Excerpts from *May It Please the Court* . . . Published 1993, Live Recordings of Landmark Cases as Argued Before the Supreme Court Since 1955 . . Pages 46 to 51 .. .. 23a

IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The Mar 14, 2002 Summary Order of the United States Court of Appeals for the Second Circuit appears at Appendix A (1a-3a). It is unpublished.

The May 17, 2001 Judgment of the United States District Court, Southern District of New York appears at Appendix B (4a). It is unpublished.

The May 16, 2001 Memorandum Decision and Order of the United States District Court, Southern District of New York appears at Appendix C (5a-22a). It is unpublished.

Statement of Jurisdiction

Jurisdiction is invoked under 28 U.S.C. § 1254(1).

This petition is timely filed within 90 days after Mar 14, 2002: on or before Jun 12, 2002. *Rule* 13.1.

Constitutional Provisions and Statutes Involved

A. United States Constitutional Provisions

United States Constitution provides, in relevant parts, as follows:

1. . . . We the People of the United States, in order to form a more perfect Union, establish Justice,

insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do hereby ordain and establish this Constitution for the United States of America.

U.S. Const. Preamble. (Adopted Sep, 1787).

2. . . . This Constitution, and the Laws of the United States . . . ; . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. Art. VI, cl. 2. (Adopted Sep, 1787).

3. The Senators and Representatives . . . and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

U.S. Const. Art. VI, cl. 3. (Adopted Sep, 1787).

4. Congress shall make no law . . . abridging . . . the right of the people to petition the Government for a redress of grievances.

U.S. Const. Amend. 1. (Ratified Dec, 1791).

5. A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

U.S. Const. Amend. 2. (Ratified Dec, 1791).

6. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .

U.S. Const. Amend. 4. (Ratified Dec, 1791).

7. . . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, . . . , nor be deprived of life, liberty, or property, without due process of law; . . . nor shall private property be taken for public use without just compensation.

U.S. Const. Amend. 5. (Ratified Dec, 1791).

8. . . . Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const. Amend. 8. (Ratified Dec, 1791).

9. The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

U.S. Const. Amend. 9. (Ratified Dec, 1791).

10. The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

U.S. Const. Amend. 10. (Ratified Dec, 1791).

11. . . . Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

U.S. Const. Amend. 13. (Ratified Dec, 1865).

12. . . . No State shall make or enforce any law which shall abridge the privileges or immunities . . .; nor shall any State deprive any persons of life, liberty, or property, without due process of law; nor deny to any person . . . the equal protection of the laws.

U.S. Const. Amend. 14. (Ratified Jul, 1868).

13. . . . The right . . . to vote shall not be denied or abridged by the United States or by any State on account of sex.

U.S. Const. Amend. 19. (Ratified Aug, 1920).

14. . . . The right of citizens . . ., who are eighteen years of age, or older, to vote shall not be denied or abridged . . . on account of age.

U.S. Const. Amend. 26. (Ratified Jul, 1971).

B. United States Statutory Provisions

United States Statutes provide, in relevant part, as follows:

15. **(a) Statement of equal rights**

All persons . . . shall have the same right in every State . . . to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, . . . exactions of every kind, and to no other.

(c) Protection against impairment

The rights protected by this section are protected against impairment by

nongovernmental discrimination and impairment under color of State law.

42 U.S.C. § 1981 ("Equal rights under the law").

16. All citizens . . . shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

42 U.S.C. § 1982 ("Property rights of citizens").

17. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. ..

42 U.S.C. § 1983 ("Civil action for deprivation of rights": a "Constitutional Tort" committed under Color of Law, *Bl. Dict.* (6th ed.), p. 1489).

18. **(2) Obstructing justice**; . . .

; . . . or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State . . . with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

(3) **Depriving persons of rights or privileges.**

If two or more persons in any State .. conspire, . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or for the purpose of preventing or hindering the constituted authorities of any State . . . from giving or securing to all persons within such State . . . the equal protection of the laws; . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercised any right or privilege . . . , the party sc injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. § 1985 ("Conspiracy to interfere with civil rights").

C. New York State Constitutional Provisions

New York State Constitution provides, in relevant parts, as follows:

19. § 1. [Oath of office; no other test for public office.]

Members of the legislature, and all officers, executive and judicial, . . . shall, . . . take and subscribe the following oath or affirmation: "I do solemnly swear (or affirm) that I will support the constitution of the United States, and the constitution of the State of New York,

> and that I will faithfully discharge the duties of the office of . . ., according to the best of my ability;" . . .
>
> **N.Y.S. Const.**, Art. XIII (Public Officers), § 1.

Statement of the Case

A. Statement of Material Facts

Petitioner Andrew C. Schiffer ("Schiffer"), age 61, is a Registered Architect. He never ever was, nor is now, a criminal. A resident of the Village of Hastings-on-Hudson in New York, he was, still is now, duly licensed to carry firearms for 30+ years. He is an avid collector of antique pistols and guns since 1963 and a forensic expert in ammunitions. He makes specialized hand-loaded custom rounds of pistol ammunition for his own use in hunting deer. They are "extremely hazardous when used in any other pistol and/or by any other person." (6a).

On Dec 5, 1999, Toby Rogers, current husband of Denise Rogers, was, with his wife ("Rogers"), Schiffer's tenant. Angel Waters ("Waters") is the ex-husband of Toby's wife. The Dec 5, 1999 altercation between Rogers and Waters was "man *beating* man" back and forth: *an obvious crime* in front of the rented apartment causing lawlessness and disturbing peace and quiet *inside* Schiffer's peaceful and quiet home (7a).

Sometime before the police had arrived at the crime scene, Schiffer pointed his single action pistol towards Waters, *uncocked* the weapon, and threatened to shoot: in plain view. *Uncocked* guns don't shoot, much less kill, just like, dead men don't talk, much less walk. (15a). The police arrived only after (not before or

during) *crime in progress*, decided that Schiffer posed a potential danger to the Police themselves and to the bystanders and neighbors because Schiffer *stopped Waters from consummating* into *killing Waters' own crime in progress* and helped *rescue* all: his tenants, Waters and himself too. (14a-15a).

On Dec 5, 1999, the police confiscated Schiffer's gun permits, took possession of two of his pistols (which were loaded with eleven rounds of ammunition - six rounds of which were custom made by him) and turned their entire confiscation over to the County for either return or further action. (7a).

On Dec 15, 1999, County made an application by Order to Show Cause before NY State Supreme Court, Westchester County, to permanently revoke Schiffer's gun permit and order him to immediately surrender his entire collection of guns to County officials which he did on Dec 19 and 20, 1999. (7a-8a).

On Feb 8, 2000, the court flatly denied County's motion. On Feb 9, 2000, County returned part of (not the entire) confiscation, still refuses to do so and continues to be in Contempt of Court. (8a).

B. Stage in the Proceedings at which Federal Questions were Raised

Federal questions were raised at both the District Court and also the Court of Appeals stages.

Reasons for Allowing the Writ

The questions presented involve seminal issues of seminal importance far beyond the facts and parties involved and also seminal disagreements/conflicts

between basic supreme laws and public policies of the land, including New York, that protect the health, welfare, and safety of each and every baby, woman, and man, regardless of sex, age, . . .

No one is above law. Therefore, the seminal importance of Constitutional, legal, judicial and thus of the basic human values or *ethos* (which means culture, philosophy, . . . nation of people) is, first and foremost, to the Honorable Majesty of the Supreme Court and the plethora of inferior courts themselves, and, then, to the public/people and each and every member thereof.

The *ethos* -- *unequally* protecting the violators/conspirators (ab)using courts as safe-havens and the violated/deprived as scapegoats -- is the root *cause* and *effect* of *pathos* (which means pain and suffering): worse now in the "post-911 *live-evil* world" that is of both national and international importance.

It is of further seminal importance, even more so, to the nobility/*ethos* of the law professionals. There is an inherent conflict of interest in their two sacred duties: as practitioners of law (to zealously defend the clients) and, conversely, as officers of the courts (to respect and protect the Honorable Majesty of the courts) too.

In 1994, the Honorable Federal Court protected itself against a *pro se* litigant in *Sato* v. *Plunkett*, 154 F.R.D. 189 (N.D. Ill.). In 1972, the Honorable State Judiciary protected itself against a lawyer too zealously representing a litigant when the NY County Civil Court issued its judicial warning that NY State Bar members, who deliberately withhold information to inveigle the courts into making decisions the courts should not

make, will be held in contempt of courts and those papers with all pertinent facts will be submitted to the Grievance Committee for appropriate action. [1]

The One and Only Reason for Allowing the Writ

The "*pathos* as *ethos*" Constitutionalized as textbook law thus human value in *DeShaney* (23a-30a at 24a-25a)[2] and thus also in this case too is both: (**a**) an *unequal* protection of the laws and public policies -- that protect the health, welfare, and safety of each and every baby, woman, and man, regardless of sex, age, . . . and also (**b**) in conflict with both *Dennis*[3] -- that does not make conspiracy a civil or criminal right and also *Jackson* v. *City of Joliet*, 1983, 715 F2d 1200, 1202-03, 1205 (7th Cir.) - that imposes § 1983 liability for *intentional misconduct*.

---

[1] This is being published as a warning to all members of the Bar. Henceforth, any attorney who submits papers to this court which deliberately . . . withholds information to inveigle the court into making a decision it should not make, will be held in contempt of court and the papers together with all the pertinent facts will be submitted to the Grievance Committee . . . for appropriate action.

Garcia v. *Silverman*, 1972, Civil Ct. N.Y.Co., 70 Misc. 2d 537-38.

[2] . . if two policemen see a rape and watch it just for their own amusement, [it is] no violation of the Constitution . . (laughter).

DeShaney v. *Winnebago County*, 1989, 489 US 189 (24a-25a).

[3] The Constitution does not make conspiracy a civil [or criminal] right.

Dennis v. *US*, 1951, 341 US 494).

DeShaney involved a man (baby's father) *beating repeatedly* his own baby because social services failed to stop and rescue *either one* from the crime in progress. Likewise, this case involves a man (landlord Schiffer) who helped stop and rescue a man *beating repeatedly* a man inside his own home because policemen failed to stop and rescue *either one* from the crime in progress.

Funded by people's hard-earned dollars paid as taxes, only such textbook *pathos* as *ethos* makes the policemen, in the line of their duty to prevent and stop crimes (rapes, beating, killing etc.), *instead*, enjoy and promote rapes[4], make their living as such

---

[4] Amongst a plethora of other stats, the following online stats on www.rainn.org/statistics.html may be helpful:

Every two minutes, somewhere in America, someone is sexually assaulted.

RAINN calculation based on 2000 National Crime Victimization Survey. Bureau of Justice Statistics, U.S. Department of Justice. [Here are details of the calculation.]

In 2000, there were 261,000 victims of rape, attempted rape or sexual assault. [2000 National Crime Victimization Survey. Bureau of Justice Statistics.]

Of these 261,000, 114,000 were victims of sexual assault, 55,000 were victims of attempted rape, and 92,000 were victims of completed rape. [2000 NCVS.]

Because of the methodology of the National Crime Victimization Survey, these figures do not include victims 12 or younger. While there are no reliable annual surveys of sexual assaults on children, the Justice Department has estimated that one of six victims are under age 12. [Child Rape Victims, 1992].

policemen and even feed their own families with such desecrated incomes. When the finest, *in the line of their duty to protect against crimes, instead,* watch rapes just for their own *Constitutional* amusement, making "more perfect" the manifest betrayal of the faith, trust and belief in, thus respect for, law, lawyers and courts of law, then, such tax-funded premeditated predatory police action(s) - whether only one, two, a few or a lot more -- are all tantamount to either state-authorized public policies or customs and/or self-authorized private policies or customs ("Premeditated Predatory Conspiracies[5] and/or Chain Conspiracies[6]) with a

---

[5] *Conspiracy* is two or more persons committing, in concert, an unlawful or criminal act, or an act which is lawful in itself but becomes unlawful when done by concerted action of the conspirators, or such persons using criminal or unlawful means to commit an act not in itself unlawful. *Bl. Dict.*, 6th ed., p. 309.

A person is guilty of conspiracy with other(s) to commit a crime [rape, killing and/or beating] if with the purpose of promoting or facilitating its commission that person: (a) agrees with the other person(s) that they, or one or more of them, will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime; or (b) agrees to aid such other person(s) in the planning or commission of such crime or of an attempt or solicitation to commit such crime. *Model Penal Code*, § 5.03. *Bl. Dict.*, 6th ed., p. 310.

[6] *Chain conspiracy* is characterized by different activities carried on with same subject of conspiracy [crime] in chain-like manner that each conspirator in chain-like manner performs a

major side-effect: *The "finest" lawmen even stop good men from protecting the raped and from preventing the resulting psychological aftermath that also desecrates the resulting babies and their raped mothers as possible side-effects too.*

There are a number of federal statutes prohibiting specific types of conspiracy. See, *e.g.*, 18 U.S.C.A. §371.

This ordinary case is an extraordinary opportunity for an extraordinary Constitutional *unanimity against rapes*. The Court may wish to favor legal responsibility and disfavor (if not abhor) legal irresponsibility for rapes of our own innocent humanity, to outlaw (as bad law) its own 1989 landmark *DeShaney* and make instead (as good law) its own new perpetual landmark to outlaw a specific type of conspiracy, namely,

CONSPIRACY WITH CRIMES HURTING HUMANS.

This Court may wish to help because bad landmark law *DeShaney* is in conflict with not only *Dennis* and *Jackson* (*supra*) but, worst yet, also with a plethora of secured 1791 Bill of Rights based on a plethora of both landmark and non-landmark laws various courts made.

Law No. 1

This Court is empowered to make the supreme law of the land (including NY and other States) that is not only binding on the Judges in every State (*U.S. Const.* Art. VI, cl. 2) but also on Senators and Representatives, Members of the State Legislatures, and all Federal and State executive and judicial Officers bound by

---

separate function which serves in the accomplishment of the overall conspiracy.
Bolden v. *State*, 410 A2d 1085, 1091.

Oath/Affirmation to support the Constitution (*U.S. Const.* Art. VI, cl. 3; N.Y.S. Const., Art. XIII, § 1).

Law No. 2

Cardozo's basic settled law on **judicial process** helps justify Court's **judicial jurisdiction**.

> . . . The sentence of today will make the right and wrong of tomorrow. . .

Cardozo, Benjamin N., *The Nature of the Judicial Process* (1921 *Classic*), 1991 Paperback Ed., p. 21.

> Jurisdiction exists that rights may be maintained. Rights are not maintained that jurisdiction may exist.

Matter of Berkowitz v. *Arbib & Houlberg*, **Cardozo, J., Ct App** 1921, 230 N.Y. 261, 274.

Law No. 3

Neither the violators nor the conspirators nor the violated nor the deprived live good. Instead, all four *live evil* under *pathos* as *ethos*. It's a lose-all bad law. Yet, the Judgment in this case relies on, *inter alia*, also on one of the worst such bad laws, *to wit*:

> "individuals are not entitled to *predeprivation* procedural protection when deprivations are effected by the 'random and unauthorized' acts of low-level . . . employees, even when those acts are intentional rather than negligent . . . determined by whether the . . . employee that effects the deprivation 'ha[d] final authority over the decision-making process.'" (16a-17a).

A *rape* in life is crime in law and sin in religion: far worse than *killing* and far lesser *beating*. Regardless of sex, age and/or religion, one *killed* once can never be killed again, ever; but, *just the reverse*, one (almost always a woman or a baby) raped and/or beaten once can, and is, raped and/or beaten again, and again, . . . repeatedly, even after enduring disability, . . . *but surely not after death from killing*.

Killing ends life problems of the dead. Raping and beating begin life problems of the raped and beaten that bad laws force them to endure and learn to live with until death, from killing or otherwise, ends same.

Such a lose-all bad law, *inter alia*, begs the Court to outlaw same in favor of a win-all good law that is fuly supported by, thus not in conflict with, the following.

In 1908, the US Supreme Court, inspired by the then compelling, now famous, *Brandeis Brief*, made one such win-all good law protecting the health, welfare and safety of women as mothers of the human race:

> . . . That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious . . . as healthy mothers are essential to vigorous offspring, the physical [and, even more so, mental] well-being of woman becomes an objective of public interest and care in order to preserve the strength and vigor of the [*human*] race [conceived, birthed, nursed and nurtured by women: *unbiased by sex* and even when abandoned by the biological

> father] . . . Differentiated by these matters from the other [male] sex, she is properly placed in a class by herself, and legislation designed for her protection may be sustained, even when like legislation is not necessary for men and could not be sustained [for the male sex]. . .
> *Muller* v. *Oregon*, 1908, 208 US 412, 421.

In 1915, inspired by the 1908 *Muller* and others too, the NY State Court of Appeals also made another law:

> [p. 401]. . . Protection of the health of women is a subject of special concern to the state. . . [p. 409] . . . , we conclude the statute is constitutional as a police regulation in the interest of public health and the general welfare of the people . . . [p. 410] . . . The [old] statute . . . in the [*People* v.] *Williams* [1907, 189 NY 131, case, like the present one, prohibited night work by women in factories, . . . but the facts on which the [p. 411] former statute might rest as a health regulation and arguments made to us in behalf of its constitutionality [then] were far different [and far less compelling or credible] than those in the present case [made now]. . . .While theoretically we may have been able to take judicial notice of some of the facts and of some of the legislation now called to our attention as sustaining the belief and opinion that night work in factories is widely and substantially injurious to the health of women, actually very few of these facts [and arguments] were called to our attention [then],

> and the argument to uphold the law [then] on that ground was brief and inconsequential.

People v. *Charles Schweinler Press*, 1915, 214 NY 395, 401, 409, 410, 411 (Ct. App., **Hiscock, J.**, the legendary **Cardozo J.**, also concurring).

In 1921, **Cardozo, J.**, made one more extraordinary new ground-breaking law on danger and rescue: *danger invites rescue* as *rescue impedes danger*.

> . . . [p. 180] Danger invites rescue. The cry of distress is the summons to relief. The law does not ignore these reactions of the mind in tracing conduct to its consequences. It recognizes them as normal. . . The wrong that imperils life is a wrong to the imperiled victim; it is a wrong also to his rescuer. The state that leaves an opening in a bridge is liable to the child that falls into the stream, but liable also to the parent who plunges to its aid. (*Gibney* v. *State of NY*, 137 NY 1). . [p. 181] . . "the human mind," as we have said (*People* v. *Majone*, 91 NY 211, 212), "acts with celerity which it is sometimes impossible to measure."

Wagner v. International Ry. Co., 1921, 232 NY 176, 180-181 (**Cardozo, J.**, Ct. App., **Hiscock, Ch. J.**, also concurring; *no dissent*).

Law No. 4

In *Jackson* v. *City of Joliet*, the Federal Appellate Court reaffirmed that an <u>*intentional misconduct*</u> would render State liability under section 1983.

> It would be a different case if intentional misconduct were alleged; we may assume that

> if officer Taylor, knowing the car was occupied and wanting the occupants to be burnt to death, directed traffic away from the scene in order to prevent any passing driver from saving them, he would be liable under section 1983 for having under color of [law] making him a public officer deprived the plaintiffs' decedents of their lives without due process of law. See *Brazier* v. *Cherry*, 293 F2d 401, 404-05 (5th Cir. 1961); cf. *State Bank* v. *Camic*, 712 F2d 1140, 1147 (7th Cir. 1983). . . .
>
> *Jackson* v. *City of Joliet*, 1983, 715 F2d 1200, 1202-03, 1205 (7th Cir.).

The Court's extraordinary winning argument in *DeShaney* involves *intentional amusement* of policemen watching rape[7], an *intentional crime*, that is tantamount to Premeditated Predatory Conspiracy and/or Chain Conspiracy *for* the man *raping* a woman. Likewise, this case *Schiffer* also involves *intentional confiscating* that is tantamount to such Conspiracy(ies) *against* the man *stopping* a *beating* and thus *for* the man *beating* a man, back and forth. Both are in conflict with *Jackson* too.

Law No. 5

Since 1920, the right to vote on account of sex and, 50+ years later, since 1971, on account of age (eighteen or older) is secured to each and every citizen *without even one isolated exception*. *U.S. Const.* Amend. 19 and 26.

---

[7] . . if two policemen see a rape and watch it just for their own amusement, [it is] no violation of the Constitution . . (laughter).

DeShaney v. *Winnebago County*, 1989, 489 US 189 (24a-25a).

Yet, in 1989, the secured rights of laymen (even policemen) to rape women for the rapists' enjoyment and to watch such rape just for the policemen's own amusement were reaffirmed to laymen and policemen in the Court's winning argument[7] to help justify a father (man) *beating* his own baby in *DeShaney* and thus, in 2002, the secured rights of one human to *beat* another human too: even a man, never mind a baby or woman.

Law No. 6

Since 1791, the secured rights of the people (each and every baby, woman and man: both laypersons and lawpersons) to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures by lawmen ensure that not even one such person is deprived of life, liberty, or property, without due process of law, that no private property is taken for public use without just compensation to the deprived, that excessive bail is not required nor excessive fine is imposed, and that no cruel and unusual punishment is inflicted. *U.S. Const.* Amends. 4, 5 and 8.

Yet, in 1989 and in 2002, the very same secured rights of each and every woman not to be raped and of each and every baby (even man) not to be beaten could have been *kept secured* (not *sacrificed*) but for the *ethos* -- *unequally* protecting violators/conspirators (ab)using courts as safe-havens and violated/deprived as scapegoats - that is the root *cause* and *effect* of *pathos*.

Worldwide[8], the belief -- that even the Honorable Majesty of this Supreme Court is not potent to make

---

8 . . . . The Constitution is certainly the most influential legal document in existence. Since its

the change (for better) in such *ethos* – is a myth: not a Constitutional right. Such a welcome change is in the sole and exclusive discretion of this omnipotent Court.

Law No. 7

Since 1865, slavery and involuntary servitude are outlawed: except as punishment for crime of which one has been duly convicted. *U.S. Const.* Amend. 13.

> creation some two hundred years ago, over one hundred countries around the world have adopted it as their own. ¶ And it is a living document. It is the world's oldest surviving constitution. And, while the Supreme Court continually interprets the Constitution so as to reflect a rapidly changing world, its basic tenets have remained virtually unchanged since its inception, and unchallenged as well. People quarrel over its interpretation, but never do they question the wisdom of its underlying principles. Imagine creating a document that governs your grandchildren's grandchildren's grandchildren! That's what the men of the 1787 Constitutional Convention did. ¶ For this very reason, great people have spent their lives studying and interpreting the Constitution. In this little book, you'll begin to see why. You'll get a taste of some of the founding father's thoughts. You'll see some of the reasoning behind the Supreme Court's landmark decisions. But, most importantly, you'll get a feel for the Constitution itself and how it is that a document that was written over 200 years ago still plays an integral part in our everyday lives.

The U. S. Constitution *And Fascinating Facts About It,* FOREWORD, 1st ed., 1993, © Oak Hill Publishing Company. ISBN 1-881473-21-X.

Yet, in 2002, the *1989 DeShaney* and the *2002 Schiffer* case still leave two seminal questions unanswered in our high cultured/educated civilization of the world's best democracy: the birth place and cradle of human rights as conceived and as still being nursed by the 1776 Declaration of Independence, the 1787 Constitution of the United States and the 1791 Bill of Rights.

> Aren't private and/or public rapes of women and beatings of babies (even of men) as crimes (including killings, conspiracies and/or chain-conspiracies with crimes) tantamount to slavery and/or involuntary servitude, of the violated and/or the deprived, to the violators and/or the conspirators (ab)using courts as their safe-havens and, thus, to punishments: that too, cruel and unusual punishments that is in manifest conflict with *U.S. Const.* Amend. 8?

> Aren't being born as a baby and being beaten (*DeShaney* leaves no choice for either sex) and, worst yet, enduring life as a woman (even living as a man) (*DeShaney* leaves no choice for either) tantamount to having been duly convicted for the "crimes of being born"?

Law No. 8

Since 1868, it is unconstitutional for a State to make or enforce a law that abridges the privileges or immunities or to deprive any persons of life, liberty, or property, without due process of law or to deny to any person the equal protection of the laws: worst yet, *biased* by sex and/or age. *U.S. Const.* Amend. 14.

Yet, in 2002, the *1989 DeShaney* and the *2002 Schiffer* leave following two seminal question unanswered too.

Aren't the life, liberty, and/or property of such persons as women (being *raped* for amusement of both lawmen and laymen alike) and babies (even women and men beaten during arguments) being deprived, without due process of law?

Aren't such violated/deprived humans being denied the equal protection of the laws since unequal protection of laws, *biased* by sex and/or age, is solely and exclusively bestowed the violators/conspirators: *albeit* it is unconstitutional for a State to make or enforce any such law that abridges such secured privileges or immunities of such women and babies: even men too?

Laws No. 9, 10, 11, 12 and 13

42 U.S.C. § 1981 ensures that all persons shall have the same right to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, that they shall be subject to like punishment, pains, penalties, exactions of every kind, and to no other and that such protected rights are also protected against impairment by both nongovernmental discrimination and also impairment under color of State law.

42 U.S.C. § 1982 ensures that all persons shall have the same right to inherit, purchase, lease, sell, hold, and convey real and personal property as white citizens.

42 U.S.C. § 1983 makes every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State subjects, or causes to be subjected, any citizen to the deprivation of any rights, privileges

or immunities secured by the Constitution and laws, liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress against such Constitutional Tort committed under color of law.

42 U.S.C. § 1985 ensures that if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws.

42 U.S.C. § 1985 also ensures that if two or more persons in any State conspire for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or for the purpose of preventing or hindering the constituted authorities of any State from giving or securing to all persons within such State the equal protection of the laws; and thus if one or more persons engaged in conspiracy do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercised any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

The powers of all these four laws are paralyzed by the *unequal* protection of laws Constitutionalized in *DeShaney*: whites and/or non-whites matter not.

Law No. 14

Since 1791, the secured right of the people to keep and bear Arms is protected from being infringed as inevitable for a well regulated Militia and security of a free State and thus their secured right to petition the Government for a redress of grievances is protected too from bring abridged. *U.S. Const.* Amends. 2 and 1.

In this 2002 *Schiffer* case, even if the right to bear arms is (mis)perceived as collective but not individual, Schiffer's firearms permits and antique collection of firearms, still partially confiscated, are Constitutionally protected as "property interests" (14th Amend.): *akin* to identical "property interests" acquired in one's building permits under State law.

> [p. 48-49] Municipalities are "persons" subject to suit under section 1983 for the deprivation of constitutionally protected rights caused by actions which "implement, [ ] or execute [ ] a policy statement, ordinance, regulation, or decision officially adopted and promulgated by [its] officers" (*Monell* [*supra*] 436 US 658, 690, 98 S. Ct. 2018, 2036-2036, . . ; *Pembaur* v. *Cincinnati*, 475 US 469, 479-480, 106 S. Ct. 1292, 1298-1299, . . .). . . . Liability may even be imposed for a single act, as long as it is the act of an official authorized to decide policy in that area (citations omitted). . . . [p. 49-50]. The key factor . . is not whether State was justified in depriving the individual of his or her property, but rather whether the State obeyed the strictures of the Constitution in doing so (citation omitted) . . [p. 52] To succeed on their claims for damages pursuant to 42 USC §1983, [private] defendants must establish (1) deprivation of a protectable property interest (2) by one acting

under the authority of law (*Parratt* v. *Taylor*, 451 US 527, 535, 101 S. Ct. 1908, 1912-1913).

The hallmark of property, "is an individual entitlement grounded in state law, which cannot be removed except 'for cause' " (*Logan* v. *Zimmerman Brush Co.*, 455 US 422, 430, 102 S. Ct. 1148, 1155, 71 L.Ed2d 265; *Parratt* v. *Taylor, supra;* . . . .). . . . they must show that pursuant to State or local law, they had a "legitimate claim of entitlement [not mere expectation or hope] to continue construction [authorized by the building permit, *akin* to Schiffer's legitimate claim of entitlement, not mere expectation or hope, to continue enjoyment authorized by the firearms permit for 30+ years and counting] . . . the Town had "engendered a clear expectation of continued enjoyment" of the [building] permit [*akin* to firearms permit] sufficient to constitute a protectable property interest [p. 53] for purposes of a section 1983 claim (*Barry* v. *Barchi*, 443 US 55, 64, n. 11, 99 S. Ct. 2642, 2649, n. 11, 61 L. Ed2d 365); there was a "certainty or a very strong likelihood" that defendants would have completed the project absent the deprivation of due process (see, *Yale Auto Parts, supra,* at 59). [¶] Having acquired a cognizable property interest, due process assures the defendants the right to be free from arbitrary or irrational municipal actions destructive of this interest (see, *Arlington Hgts.* V. *Metropolitan Hous. Corp.*, 428 US 252, 267, 97 S. Ct. 555, 564-565, 50 L.Ed2d 450; . . .). [*Emp. added*].

Town of Orangetown v. *Magee*, 1996, 88 NY2d 41, 48-49, 49-50, 52, 53 (Ct. of App.)

Yet, in 2002, the *1989 DeShaney* and the *2002 Schiffer* leave the following seminal question unanswered too.

Do the secured rights of the violated/deprived to petition the Government for a redress of grievances - converted/perverted into far more secured rights to relief favoring the violators/conspirators instead -- dishonor the Honorable Majesty of the Courts as the safe-havens for the violators and/or the conspirators (thus as the star-chambers for the violated and/or the deprived) and isn't such conversion/perversion tantamount to *double jeopardy* in conflict with the Amend. 5 provision against "any person be[ing] subject[ed] for the same offence to be twice put in jeopardy of life or limb [first outside the courts with *no predeprivation rights* and then inside the courts with *no postdeprivation rights* either]"?

Law No. 15

Since 1791, it is textbook law that the enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people and thus the powers not delegated to the United States by the Constitution, nor prohibited to the States, are still reserved to the States respectively, *or to the people* to the extent they are not so delegated to the United States and/or not so prohibited or reserved to the States. (*U.S. Const.* Amends. 9 and 10).

Since 1787, it is also textbook law that "We the People of the United States, in order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do hereby ordain and establish this Constitution for the United States of America." (*U.S. Const.*, Preamble).

Yet, in 2002, the *1989 DeShaney* and the *2002 Schiffer* leave following three seminal questions unanswered.

(a) Are manifest crimes (and civil wrongs) that are being committed by violators/conspirators, (ab)using courts as safe-havens with absolute, conditional and/or other immunities and (ab)using the violated/deprived as scapegoats both the *cause* and *effect* of the sacred Constitution?

{b) Is *pathos* as *ethos* compelling enough to inspire this Court to invoke its *dormant* innate *ethos*, outlaw *pathos* Constitutionalized in *DeShaney*, ensure *equal* protection of laws and protect, from violators/conspirators as abusers, the courts being (ab)used as safe-havens and also violated/deprived (ab)used as scapegoats?

(c) Can *Matter of Mazzei* (p. i, *supra)* lead the society to misperceive the highest level of judicial honesty and integrity, evidenced by the reaffirmed Judgment, to be irreversible Constitutionalized *pathos* as *ethos*?

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ANDREW C. SCHIFFER, *Pro Se*
ROUTE 8, PO BOX 503
Speculator, NY 12164
518 548-6360

Jun 10, 2002

APPENDIX A

Mar 14, 2002 Summary Order:
United States Court of Appeals, Second Circuit

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 14th day of March, two thousand and two.

PRESENT: HON. JOSEPH M. McLAUGHLIN,
HON. DENNIS JACOBS,
HON. DAMON J. KEITH, *
Circuit Judges.

---

* The Honorable Damon J. Keith, Senior Judge, United States Court of Appeals for the Sixth Circuit, sitting by designation.

----------x

ANDREW C. SCHIFFER
Plaintiff-Appellant

-v.- 01-7687

VILLAGE OF HASTINGS-ON-HUDSON, HASTINGS-ON-HUDSON POLICE DEPARTMENT, POLICE OFFICERS RICK WHITE, ANDREW HAYDEN, WAYNE PIETROPOLO, DAVID DOSHEN, DISH O'SULLIVAN, OTHERS as yet unknown, included as John/Jane Does Numbered 1 to 10 individually,
Defendants-Appellees,

COUNTY OF WESTCHESTER,
Defendant.

----------x

APPEARING FOR APPELLANT:
Lalit Jain, New York, NY
(Gopaljee Jaiswal, New York, NY, on the brief).

APPEARING FOR APPELLEES:
Eli S. Cohn, McDonough,
Marcus, Cohn, Tretter, Heller & Kanca LLP,
New Rochelle, NY.

Appeal from the United States District Court for the Southern District of New York (Barrington D. Parker, J.).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the district court be, and it hereby is, **AFFIRMED**.

Andrew C. Schiffer appeals from an order of the United States District Court for the Southern District of New York (Barrington D. Parker, J.) dismissing his complaint under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief could be granted.

We affirm for substantially the reasons stated in the district court's Memorandum Decision and Order dated May 16, 2001. Schiffer does not challenge the district court's decision except to argue that New York State's issuance of individual gun permits demonstrates [1] an individual right to carry arms, [2] a custom or policy sufficient to support his Section 1983 claim against the municipal defendants, and [3] bad faith of the individual officers when they confiscated Schiffer's firearms. These arguments are without merit.

For the reasons set forth above, the judgment of the district court is hereby AFFIRMED.

FOR THE COURT:
Roseann B. MacKechnie,
Clerk of Court

BY:_____

APPENDIX B

May 17, 2001 Judgment: United States District Court, Southern District of New York

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

ANDREW C. SCHIFFER,
Plaintiff,
-against-

01 Civ. 1312 (BDP)
JUDGMENT

VILLAGE OF HASTINGS-ON-HUDSON, HASTINGS-ON-HUDSON POLICE DEPARTMENT, COUNTY OF WESTCHESTER, POLICE OFFICERS RICK WHITE, ANDREW HAYDEN, WAYNE PIETROPOLO, DAVID DOSHIN, DISH, O'SULLIVAN, OTHERS as of yet unknown, included as John/Jane Does Numbered 1 to 10 individually,
Defendants.

----------X

SEAL: MAY 17, 2001

Whereas the above entitled action having been assigned to the Honorable Barrington D. Parker, Jr. , U. S. D. J., and the Court thereafter on May 16, 2001 having handed down its Memorandum Decision and Order granting the defendants' motion to dismiss for failure to state a claim upon which relief could be granted. See Fed. R. Civ. P. Rule 12(b); it is

ORDERED, ADJUDGED AND DECREED: That the Complaint be and is hereby dismissed.

DATED: White Plains, N. Y.
May 17, 2001

s/James M. Parkeson
Clerk

THIS DOCUMENT WAS ENTERED
ON THE DOCKET 5/17/01.

APPENDIX C

May 16, 2001 Memorandum Decision and Order: United States District Court, Southern District of New York

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

ANDREW C. SCHIFFER,

Plaintiff,

-against-

VILLAGE OF HASTINGS-ON-HUDSON, HASTINGS-ON-HUDSON POLICE DEPARTMENT, COUNTY OF WESTCHESTER, POLICE OFFICERS RICK WHITE, ANDREW HAYDEN, WAYNE PIETROPOLO, DAVID DOSHIN, DISH, O'SULLIVAN, OTHERS as of yet unknown, included as John/Jane Does Numbered 1 to 10 individually,

Defendants.

----------X

01 Civ. 1312 (BDP)

MEMORANDUM DECISION AND ORDER

BARRINGTON D. PARKER, JR., U. S. D. J.

Plaintiff Andrew C. Schiffer brings this action against various Defendants under 42 U.S.C. §§ 1981, 1982, 1983 and 1985, alleging violations of his constitutional rights under the Second, Fourth and Fourteenth Amendments. Defendants move to dismiss the Complaint for failure to state a claim upon which relief could be granted. See Fed. R. Civ. P. 12(b). For the reasons set forth below, Defendants' motion is granted.

BACKGROUND

For purposes of deciding this motion, the Court construes the pleadings in favor of the Plaintiff, and accepts as true all factual allegations in the Complaint. See Cooper v. Parsky,140 F.3d 433, 440 (2d Cir. 1998); Serrano v. 900 5th Avenue Corp., 4 F. Supp. 2d 315, 316 (S.D.N.Y. 1998). The following facts are construed accordingly.

Plaintiff, age 61, was a resident of the Village of Hastings-on-Hudson in New York (the "Village") until the middle of June 2000. Licensed to carry firearms for over thirty years, he has been an avid collector of antique pistols and guns since 1963, and purports to be a forensic expert in ammunitions. Plaintiff claims to make his own specialized hand-loaded custom rounds of ammunition for use in his pistols, and concedes they are "extremely hazardous when used in any other pistol and/or by any other person." Complaint ¶ 20.

Defendants are the Village, Hastings-on-Hudson Police Department (the "Village Police Department"), the County of Westchester (the "County," together with the Village and the Village Police Department, the "Municipal Defendants"), and police officers Rich White, Andrew Hayden, Wayne Pietropolo, David Dosin, Dish (first name unknown), O'Sullivan (first name unknown) and John/Jane Does 1-10 (the "Individual Police Officers").

According to the Hastings-on-Hudson police report (which Plaintiff attached to the Complaint as

Exhibit E65),[1] on December 5, 1999, an altercation took place between Toby Rogers ("Rogers"), the current husband of Denise Rogers, and Angel Waters ("Waters"), the ex-husband of Denise Rogers, in front of an apartment rented from the Plaintiff by Rogers. When the police were summoned to the scene, they were informed that at some point during the altercation, the Plaintiff brandished a gun and threatened to shoot Waters. Plaintiff contends that he was trying to stop the altercation between Rogers and Waters from escalating. According to the Complaint, the police then confiscated Plaintiff's gun permits and took possession of two of his pistols, which were loaded with eleven rounds of ammunition - six rounds of which were custom made by Plaintiff. The police officers turned the guns over to the County.

On December 15, 1999, the County made an application by Order to Show Cause before the New York State Supreme Court, Westchester County, to permanently revoke Plaintiff's gun permit. The application provided for the immediate surrender of Plaintiff's entire collection of guns to County officials,

---

[1] In deciding this motion, this Court is permitted to consider, inter alia, the documents which have been attached to the Complaint as exhibits. See Brass v. American Film Technologies, Inc., 987 F.2d 142, 150 (2d Cir. 1993) ("[C]onsideration is limited to the factual allegations in . . [the) complaint, which are accepted as true, to documents attached to the complaint as an exhibit or incorporated in it by reference, to matters of which judicial notice may be taken, or to documents either in plaintiffs' possession or of which plaintiffs had knowledge and relied on in bringing suit.").

which Plaintiff turned over on December 19 and 20, 1999.[2] The court denied the County's motion on February 8, 2000, and the County returned the gun collection on February 9, 2000, including both pistols, initially confiscated by the Village police officers. According to Plaintiff, however, the County failed to return the eleven rounds of ammunition contained in the original pistols.

The Complaint also cryptically avers to a March 17, 2000 incident whereby Plaintiff called the Village Police Department and reported that he had "definitely" seen three unauthorized men leave his home. See Complaint, at ¶ 30; Exhibit E3 of the Complaint. Because the ensuing police report merely stated that "Andrew Schiffer called reporting intruders possibly entered his home," Complaint at ¶ 30, Plaintiff argues that the police acted "maliciously" against him, alleging that "'[m]alice is self-evident." [3]

---

[2] The Complaint does not allege that the Individual Police Officers were personally involved in, or were aware of, the events surrounding Plaintiff's surrender of the remainder of his gun collection.

[3] The Complaint also makes reference to an "unconstitutionally obtained Mortgage Foreclosure Judgment," and events surrounding a state hearing under General Municipal Law 50-e (the "GML Hearing"). See Complaint, at ¶¶ 6, 9-18. However, Plaintiff does not explain if and how these allegations are related to the constitutional claims asserted in the Complaint. In any event, the Complaint does not allege that the Individual Police Officers were personally involved in either of these incidents.

The Complaint alleges that, under 42 U.S.C. § 1983, Plaintiff's Second Amendment right to bear-arms was violated, and continues to be violated, by the confiscation of his guns and by the County's failure to return the ammunition. In addition, Plaintiff contends that Defendants deprived him of his Fourth Amendment right against unreasonable searches and seizures, that his due process and equal protection rights were violated under the Fourteenth Amendment, and that he was subject to malicious prosecution and abuse of process in violation of the Fourth Amendment.[4] Moreover, the Complaint purports to allege claims under 42 U.S.C. §§ 1981, 1982 and 1985.

Defendants contend that Plaintiff's claim under the Second Amendment is not actionable under § 1983. See Fed. R. Civ. P. 12(b)(6). In addition, Defendants contend that the Municipal Defendants must be dismissed from this action because the Complaint fails to allege an ongoing practice or policy, and that the claims against the Individual Police Officers are barred on the grounds of qualified immunity.

DISCUSSION

Dismissal under Fed. R. Civ. P. 12(b) is required if " 'it appears beyond doubt that the plaintiff can

---

[4] Although unclear, the Complaint also appears to allege claims under state law. In ¶ 4 of the Complaint, Plaintiff states that Defendants' actions "escalated into malicious use-of process, malicious prosecution and/or criminal conversion of property," and cites state law authorities. See, Complaint 'at ¶ 4, n. 4-6.

prove no set of facts in support of his claim which would entitle him to relief.' " Tarshis v. Riese Organization, 211 F.3d 30, 35 (2d Cir. 2000) (quoting Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99 (1957)). In making its determination, this Court must construe the Complaint's allegations in a light most favorable to the Plaintiff. See Desiderio v. National Ass'n of Sec. Dealers. Inc., 191 F. 3d 198, 202 (2d Cir. 1999).

I. § 1983 Claims

A. Second Amendment Claim

The Plaintiff contends that Defendants' actions violated, and continue to violate, his Second Amendment rights. The Second Amendment provides that "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const., Amend. II.

It is well settled that the Second Amendment is not a source of individual rights, but rather "is meant solely to protect the rights of the states to keep and maintain armed militia." United States v. Scanio, 165 F. 3d 15, 1998 WL 802060, at *2 (2d Cir. Nov. 12, 1998); see also United States v. Miller, 307 U.S. 174, 59 S. Ct. 816, 83 L. Ed. 1206 (1939); Lewis v. United States, 445 U.S. 55, 65 n. 8, 100 S. Ct. 915, 63 L.Ed.2d 198 (1980); Hickman v. Block, 81 F.3d 98, 102 (9th Cir. 1996) ("[i]t is clear that the Second Amendment guarantees a collective "rather than an individual right") (internal quotations omitted); Love v. Pepersack, 47 F. 3d 120, 124 (4th Cir. 1995) ("The courts have consistently held that the Second Amendment

only confers a collective right of keeping and bearing arms which must bear a reasonable relationship to the preservation or efficiency of a well-regulated militia.") (internal quotations omitted); Thomas v. Members of City Council of Portland, 730 F.2d 41, 42 (1st Cir. 1984); United States v. Warin, 530 F.2d 103, 106 (6th Cir.), cert. denied 426 U.S. 948, 96 S. Ct. 3168, 49 L.Ed.2d 1185 (1976). Defendants' actions "could not possibly] violate plaintiff['s] rights under the Second Amendment since that Amendment does not confer any individual rights upon plaintiff []." Dew v. United States, No. 97 Civ. 6409, 1998 WL 159060, at *6 (S.D.N.Y. Apr. 1, 1998). Moreover, Plaintiff has not shown that his ownership of guns would beat "some reasonable relationship to the preservation or efficiency of a well-regulated militia." Miller, 307 U.S. at 178. Accordingly, Plaintiff's Second Amendment claim is dismissed.

B. Claims Against Municipal Defendants

Monell v. Department of Soc. Serv. of City of New York, 436 U.S. 658, 694, 98 S. Ct. 2018, 56 L.Ed.2d 611 (1978), held that a municipality may not be held liable under respondeat superior for alleged unconstitutional conduct by its employee below the policymaking level. Accordingly, in order to ascribe municipal liability under § 1983, Plaintiff must allege violations of his constitutional rights arising from a governmental custom or policy. See Dwares v. City of New York, 985 F.2d, 94, 100 (2d Cir. 1993); Batista v. Rodriguez, 702 F. 2d 393, 397 (2d Cir. 1983). Absent a purported causal link between the custom or policy and the alleged constitutional injury, Monell precludes

liability against a municipality. See Monell, 436 U.S. at 694 n. 58.

The Complaint fails to allege the required custom or policy against the Municipal Defendants or the Individual Police Officers in their official capacities. See Hafer v. Melo, 502 U.S. 21, 25, 112 S. Ct. 358, 116 L.Ed.2d 301 (1991) ("Because the real party in interest in an official capacity suit is the governmental entity and not the named official, the entity's policy or custom must have played a part in the violation of federal law") (internal quotations omitted); Ella v. Jackson, 216 F.3d 1071, 2000 WL 823360, at *2 (2d Cir. Jun. 22, 2000) ("[B]ecause Ella brought his claim against various defendants in their official capacities, the real party in interest is the municipality."). Rather, Plaintiff merely describes the conduct of the officers on the night of December 5, 1999, and refers to the State Supreme Court's February 2000 order as "proof positive" that his rights were violated. See generally Complaint. These averments, including Plaintiff's allegation of "self-evident" malice in connection with the March 11, 2000 police report, do not allege an official policy or custom of the Municipal Defendants. Kempfer v. County of Fulton, 107 F.3rd 3, 1997 WL 48990, at *1 (2d Cir. Jan. 15, 1997) (affirming dismissal of Monell claim because the complaint "lacks any allegation that this isolated action was customary in this municipality or involved a decision by a municipal policymaker."). Accordingly, the Village, the Village Police Department, the County and the Individual Police Officers in their official capacities are dismissed from this action.

C. Claims Against Individual Defendants

Plaintiff's remaining § 1983 claims against the Individual Police Officers in their personal capacities are barred under qualified immunity.[5] "The doctrine of qualified or good faith immunity shields police officers from being subject to personal liability for damages." Ricciuti v. N. Y. C. Transit Authority, 124 F. 3d 123, 127 (2d Cir. 1997). Qualified immunity applies where government agents performed discretionary functions and "either (1) their conduct 'did not violate clearly established rights of which a reasonable person would have known,' or (2) 'it was objectively reasonable to believe that (their] acts did not violate these clearly established rights.' " Young v. County of Fulton, 160 F. 3d 899, 903 (2d Cir. 1998) (quoting Soares v. Connecticut, 8 F. 3d 917, 920 (2d Cir. 1993) (internal quotations

---

[5] As previously noted (see supra n. 2 and 3), the Complaint does not allege that the Individual Police Officers were personally involved with Plaintiff's surrender of his gun collection on December 19 and 20, 1999, with the purported mortgage foreclosure or with the GML Hearing. Accordingly, the Court analyzes Plaintiff's remaining § 1983 claims in light of the officers' alleged conduct stemming from the December 5, 1999 incident. See Soto v. Schembri, 960 F. Supp. 751, 756 n. 3 (S.D.N.Y. 1997) ("As a prerequisite to maintaining a Section 1983 action against an official in their [sic] personal capacity, a plaintiff must allege a defendant's direct or personal involvement in the alleged constitutional deprivation.") (citing Colon v. Coughlin, 58 F. 3d 865, 873(2d Cir. 1995); Wriaght v. Smith, 21 F.3d 496, 501 (2d Cir. 1994)).

omitted)). Here, the nature of the conduct described in the Complaint simply does not establish that Plaintiff's "clearly established rights" were violated.

First, Plaintiff contends that his Fourth Amendment right against unreasonable search and seizure was violated by the Individual Police officers when his pistols were seized without a warrant on December 5, 1999. It has been established, however, that under the Fourth Amendment, "[a] limited search for weapons, without a warrant and without probable cause, is . . . permissible in connection with a lawful custodial interrogation that does not rise to the level of an arrest." McCardle v. Haddad, 131 F. 3d 43, 48 (2d Cir. 1997). "Further, the suspect need not actually be dangerous to validate such a limited-purpose search, so long as the officer has a reasonable belief that the suspect poses a danger, and may have a weapons within his reach." Id. Moreover, the Supreme Court recently reaffirmed that the Fourth Amendment does not bar warrantless seizures where "exigent circumstances" exist. Illinois v. McArthur, ___ U.S. ___, ___, 121 S. Ct. 946, 949-50, 148 L.Ed.2d 838 (2001) ("When faced with special law enforcement needs, diminished expectations of privacy, minimal intrusions, or the like, the Court has found that certain general, or individual circumstances may render a warrantless search or seizure reasonable."). Here, the allegations in the Complaint, as well as the materials attached to the Complaint, clearly show that the Individual Police Officers who seized the pistols held an objectively reasonable belief that the Plaintiff posed a danger and that a weapon was nearby. Plaintiff concedes that sometime before the police had arrived,

he pointed a single action pistol towards Waters, uncocked the weapon, and threatened to shoot him. See Complaint, Exhibit E77. He also concedes that a witness informed the officers that Plaintiff "went after [Waters] with a gun." Id. These facts show that the Individual Police Officers at the scene could have reasonably believed that Plaintiff posed a potential danger to them as well as to bystanders and neighbors, and that a potentially loaded pistol was nearby.

The fact that Plaintiff may have been justified in brandishing the weapon, or that the police may have ultimately made a mistake in judgment, is not dispositive in determining whether qualified immunity applies. See, e.g., Anderson v. Creighton, 483 U.S. 635, 641, 101 S. Ct. 3034, 91 L.Ed.2d 523 (1987) ("We have recognized that it is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present, and we have indicated that in such cases those officials . . . should not be held personally liable."). For qualified immunity to apply, the police officers need to have only reasonably believed that their actions did not violate Plaintiff's clear rights. Young, 160 F.3d at 903; see also Anderson, 483 U.S. at 643 (finding that courts have extended qualified immunity even to officials who were alleged to have violated the Fourth Amendment). As such, Plaintiff's Fourth Amendment claim against the Individual Police Officers are barred.

Second, Plaintiff contends that his procedural due process rights were violated.[6] In order to state a due

---

[6] The Complaint is unclear as to whether it alleges procedural or substantive due process violations under

process claim against the Individual Police officers in their personal capacities, Plaintiff must show that he "possessed a protected liberty or property interest, and that he was deprived of that interest without due process" when they seized his pistols on December 5, 1999. McMenemy v. City of Rochester, 241 F. 3d 279, 285-86 (2d Cir. 2001). Since Plaintiff acknowledges that post deprivation procedures were available and, indeed, were resorted to almost immediately after the seizure, see Complaint at ¶ 23 (referring to County's motion for Order to Show Cause, dated December 15, 1999, ten days after the initial confiscation), Plaintiff must show that he was entitled to predeprivation procedural protections prior to the officers' seizure of the guns.[7]

However, it is well established that "individuals are not entitled to predeprivation procedural protection when deprivations are effected by the 'random and unauthorized' acts of low-level . . . employees, even when those acts are intentional rather than negligent." Pierce v. Netzel, 225 F. 3d 646, 2000 WL 979165, at *3 (2d Cir. July 13, 2000) (citing Hudson v. Palmer, 468 U.S. 517, 104 S. Ct. 3194, 82 L.Ed.2d 393 (1984); Parratt v. Taylor, 451 U.S. 527, 101 S. Ct. 1908, 68 L.Ed.2d 420 (1981), overruled in part, Daniels v. Williams, 474 U.S. 327,

---

the Fourteenth Amendment. For purposes of this motion, the court assumes that the Complaint alleges both.

[7] Moreover, as the Municipal Defendants have been dismissed, Plaintiff does not contend that the Individual Police officers themselves were constitutionally obligated to provide Plaintiff with some form of postdeprivation due process.

106 S. Ct. 662, 88 L.Ed.2d 662 (1986)). "Whether a deprivation is 'random and unauthorized' is determined by whether the . . . employee that effects the deprivation `ha[d] final authority over the decision-making process.' " Pierce, 225 F.3d 646, 2000 WL 979165, at *3 (quoting Dwyer v. Regan, 777 F. 2d 825, 832 (2d Cir. 1985)).

The Complaint fails to allege facts indicating that the officers had final authority over the decision-making process of the ultimate seizure of the guns. As such, their conduct may be deemed, for purposes of this motion, "random and unauthorized." See Pierce, 225 F. 3d 646, 2000 WL 979165, at *3 (affirming district court's dismissal of procedural due process claim because "[plaintiff] did not allege facts indicating that [defendant] had final authority over [plaintiff's] employment"). Accordingly, Plaintiff cannot show that he was entitled to predeprivation protections, and therefore does not state a claim for deprivation of procedural due process. See Parratt, 451 U.S. at 541 (finding that a "tortious loss of prisoner's property" as a result of prison officials' conduct did not trigger predeprivation due process protections). Consequently, the individual defendants are entitled to qualified immunity.

Third, Plaintiff contends that the Individual Police officers' conduct violated his substantive due process rights. " [T]he Due Process Clause of the Fourteenth Amendment was intended to prevent government from abusing [its] power, or employing it as an instrument of oppression. . . . [and] does not

purport to supplant traditional tort law." Collins v. City of Harker Heights, 503 U.S. 115, 126, 128, 112 S. Ct. 1061, 117 L.Ed.2d 261 (1992) (internal quotations omitted). Accordingly, Plaintiff must show that "the government action was arbitrary, conscience-shocking, or oppressive in a constitutional sense, and not merely incorrect or ill-advised." Catanzaro v. Weiden, 188 F. 3d 56, 64 (2d Cir. 1999).

The allegations in the Complaint fail to show that the actions of the Individual Police Officers were sufficiently "arbitrary or conscience-shocking" to implicate constitutional protections. Accordingly, Plaintiff's substantive due process claim is legally insufficient.

Fourth, Plaintiff's equal protection claim also fails. In order to state a deprivation of equal protection rights for selective enforcement, Plaintiff must show that " (1) the person, compared with others similarly situated, was selectively treated; and (2) that such selective treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person." LeClair v. Saunders, 627 F. 2d 606, 609-10 (2d Cir. 1980); see also Macombs Pharmacy, Inc. v. Wing, 97 Civ. 5550, 1998 WL 696008, at *2 (S.D.N.Y. Oct. 6, 1998).

Here, the Complaint fails to allege that Plaintiff was treated differently from any other similarly situated persons. Moreover, Plaintiff does not contend that Defendants' conduct was driven by an invidious intent to discriminate against him.

Plaintiff does not allege that he is a member of a minority, or that some prohibited factor played a role in the officers' actions. Plaintiff's purported allegation of malice consists only of the March 17, 2000 police report whereby certain police officers (presumably different from those who investigated the December 5, 1999 incident) stated that Plaintiff reported intruders "possibly" entered his home. No inference of malice of a constitutional magnitude arises from such a report.

Finally, Plaintiff's malicious prosecution and malicious abuse of process claims are also barred as a consequence of failing to allege malice.[8] To state a claim for malicious prosecution under § 1983, Plaintiff must allege "(1) that the defendant initiated a prosecution against the plaintiff, (2) that the defendant lacked probable cause to believe the proceeding could succeed, (3) that the defendant acted with malice, . . . (4) that the prosecution was terminated in the plaintiff's favor, . . . [and] (5) [that there was] sufficient post-arraignment liberty restraint to implicate the plaintiff's Fourth Amendment rights." Rohman v. New York City

---

[8] This Court sets aside the issue of whether malicious prosecution and malicious abuse of process claims are actionable where the proceedings complained of subjected Plaintiff only to civil, not criminal, liability (i.e., the seizure of Plaintiff's guns). See Easton v. Sundram, 947 F. 2d 1011, 1018 (2d Cir. 1991) (declining to hold that "civil malicious prosecution can never give rise to a cause of action under § 1983," but recognizing that "it normally will not."). The Complaint does not allege whether any criminal proceedings were brought against Plaintiff.

Transit Authority, 215 F. 3d 208, 215 (2d Cir. 2000). As previously stated, the Complaint does not allege facts that could infer malice on the part of the Individual Police Officers. See Riciuti v. N. Y. C. Transit, 124 F. 3d 123, 131 (2d Cir. 1997) ("To succeed on a malicious prosecution claim, the plaintiffs also must demonstrate that the proceeding was instituted with malice.").

Moreover, "[a] malicious abuse of process claim lies against a defendant who (1) employs regularly issued legal process to compel performance or forbearance of some act (2) with intent to do harm without excuse or justification, and (3) in order to obtain a collateral objective that is outside the legitimate ends of the process." Cook v. Sheldon, 41 F. 3d 73, 79 (2d Cir. 1994). The Complaint does not allege facts that support an unjustified intention to harm Plaintiff by the police. At best, the alleged facts show that when the Individual Police officers seized Plaintiff's guns, they, reasonably, albeit perhaps wrongly, believed that Plaintiff may have been involved in unlawful activity and/or posed a danger to others, as evidenced by his threatening to shoot Waters.

For the reasons stated above, Plaintiff fails to allege that his "clearly established" constitutional rights were violated by the Individual Police Officers, and, accordingly, they are entitled to qualified immunity on each of Plaintiff's § 1983 claims.

II. §§ 1981, 1982 and 1985 Claims

To the extent the Complaint purports to allege claims under 42 U.S.C. §§ 1981, 1982 and 1985, they are

also insufficient.[9] Claims under §§ 1981 and 1982 require allegations of racial animus. See Mian v. Donaldson. Lufkin & Jenrette Securities Corp., 7 F. 3d 1085, 1087 (2d Cir. 1993) ("To establish a claim under § 1981, a plaintiff must allege . . . (1) the plaintiff is a member of a racial minority; (2) an intent to discriminate on the basis of race by the defendant; and (3) the discrimination concerned one or more of the activities enumerated in the statute."); Burgin v. Toys-R-Us-Nytex, Inc., No. 97 Civ. 0998, 1999 WL 454302, at *4 (W.D.N.Y. Jun. 30, 1999) ("As is true of section 1981 claims, claims under section 1982 must make clear that the alleged mistreatment was a function of racial animus and intentional discrimination."). As mentioned previously, the Complaint does not allege racial discrimination.

To state a claim under § 1985(3), Plaintiff must allege that the conduct was "motivated by 'some racial or perhaps otherwise class-based, invidiously discriminatory animus' ". Mian, 7 F. 3d at 1088 (quoting United Bhd. of Carpenters, Local 610 v. Scott, 463 U.S. 825, 834, 103 S. Ct. 3352, 77 L.Ed.2d 1049 (1983) (internal quotations omitted)). For reasons discussed above, the Complaint fails to

---

[9] Defendants do not move to dismiss the claims purportedly made under § 1981, 1982 or 1985, assuming instead that the Complaint only stated claims under § 1983. However, this Court may address these claims here, as it has the inherent authority to "dismiss a complaint sua sponte if it 'lacks an arguable basis in either [law] or in fact.' " Abrams v. Sprizzo, 201 F. 3d 430, 1999 WL 1295815, at *1 (2d Cir. Dec. 23, 1999) (quoting Benitez v. Wolff, 907 F. 2d 1293, 1294 (2d Cir. 1990)).

allege such discriminatory animus, and therefore fails to state a claim under § 1985.

III. State Law Claims

As previously mentioned (see supra n. 4), the Complaint appears to allege claims under state law. See Complaint at ¶ 4. As the Court has dismissed all federal claims in this case, there remains no independent basis for federal jurisdiction over state law claims, if any. See Carnegie-Mellon University v. Cohill, 484 U.S. 343, 350 (1988) ("when the federal law claims have dropped out of the lawsuit in its early stages and only state law claims remain, the federal court should decline the exercise of jurisdiction by dismissing the case without prejudice"); Baylis v. Marriott Corp., 843 F. 2d 658, 665 (2d Cir. 1988) ("[w]hen all bases for federal jurisdiction have been eliminated from a case so that only pendent state claims remain, the federal court should ordinarily dismiss the state claims").

CONCLUSION

For the reasons discussed above, the Defendants' motion to dismiss is granted. The Clerk of the Court is directed to enter judgment dismissing the Complaint.

SO ORDERED:

s/Barrington D. Parker
Barrington D. Parker, Jr.
United States District Judge

Dated: White Plains, NY
May 16, 2001

APPENDIX D

Nov 2, 1988 Oral Arguments and Questioning in the Landmark *DeShaney* v. *Winnebago County Department of Social Services* Case: Relevant Excerpts from *May It Please the Court* . . . Published 1993, Live Recordings of Landmark Cases as Argued Before the Supreme Court Since 1955 . . Pages 46 to 51

Page 46

Justice Blackmun: Poor Joshua.

Narrator: Mingo defended the county employees.

Mingo: All of the professionals in this case-the pediatrician, the child psychologist, the police officer who investigated the case-they all believed that abuse could not be substantiated. Every one of the professionals involved concurred, and the record is absolutely clear in that regard. They all concurred that there was no evidence to substantiate a claim for child abuse.

Court: I take it you don't agree with your colleague on the other side that the social worker was disregarding her duty under state law?

Mingo: We certainly do not agree with that position, and we believe the record is quite clear. The only duty she had under state law was to investigate when she received a report of abuse. The only report of abuse which the department ever received in this case was the initial report of suspected abuse. Immediately following that report, there was an investigation. The child was placed in the hospital for three days and

then, since there was no filing of a petition at the end of three days, the child was automatically returned to the home. After that first incident, there was absolutely no further reports of abuse.

Narrator: Chief Justice Rehnquist returned to his favorite theme.

Rehnquist: Mr. Mingo, I wonder if you wouldn't be better advised to use the term "constitutional duty" rather than state action. There's no doubt that the social worker was a state actor. She was a public employee doing this, and her acts were those of the state. Your point really is that she was not under a constitutional duty to do certain things that your opponent says she was under a duty to do.

Mingo: Yes, Your Honor, you're quite correct. State action can be quite misleading, and when I use the term "state action," I'm trying to use it in a constitutional sense, which necessarily implies a deprivation of a constitutionally protected right.

Court: And under your theory, I take it, if two policemen see a rape and watch it just for their own amusement, no violation of the Constitution?

Mingo: We would concede that there is no constitutional violation in that particular case.

Page 47

Court: You're arguing it as well as conceding it. *(laughter)*

Mingo: That's correct.

Narrator: Mingo concluded.

Mingo: In this case it is undisputed by both sides that there was no direct deprivation or direct infliction of harm upon the petitioners nor was the petitioner in the custody of the state at the time of the alleged wrongdoing.

Again, we wish to emphasize that the problem with this special relationship or "enmeshment" theory is that it fails to distinguish between privately inflicted harm and state action. On the other hand, we believe that the Court's adherence to the traditional state action or constitutional deprivation requirement provides a bright line standard which would separate actions of private wrongdoing from actions which can fairly or truly be attributed to the states.

Narrator: Donald Ayer, a deputy solicitor general, argues as "friend of the court" for the federal government.

Ayer: I want to address the due process-the deprivation of due process analysis briefly, if I could. But before I do, I'd like to say a few words about the relationship between federal and state government and the role of the federal Constitution, because I think it is reasonably clear that the area of child protection is not one that is crying out for federal constitutional oversight.

First of all, it is not an area where there is any sort of history of hostility between the state and the interests that we're talking about trying to protect. Quite the contrary. There being no

constitutional right to this protection in the first place, it's clear, I think, that the state programs that have been set up have all been set up as a matter of state and local government initiative, born of exactly the same sentiments and concerns that everyone feels toward children who are exposed to the kinds of abuse and hazards that we're sadly reviewing in this case.

Second of all, I think there's no reason to think that federal oversight, federal constitutional oversight is going to add very much to the handling of these sensitive and difficult problems. There is, I think, little reason to think that federal courts have any special expertise in the reviewing of what is at least in some sense a balance between interests of parents, respect for the interests of parents in controlling their children, as opposed to the priority of intervening when you need to and must in order to protect the child.

Page 48

Court: Protection is never one of the things that the Constitution would require the state to furnish?

Ayer: I don't think it is. I don't think that the state is obligated to provide a particular service, as desirable as that may be and as concerned as most everyone probably is that that not go on. The idea that that is somehow going to help the resolution of these problems seems to be misguided, and I think there is a good reason to fear that it may well just primarily discourage the involvement of local agencies for fear

that they're going to be facing an unmanageable and very expensive situation.

Narrator: The Court decided the case on February 22d, 1989. Joshua could not know or understand, but he lost his case. Chief Justice Rehnquist wrote for the majority. Even judges, he said, "are moved by natural sympathy . . . to find a way for Joshua and his mother to receive adequate compensation for the grievous harm inflicted upon them." But the Fourteenth Amendment did not give Joshua any claim against state officials. The due process clause, Rehnquist wrote, confers "no affirmative right to governmental aid, even where such aid may be necessary to secure life" or protection against bodily harm.

Rehnquist did not defend the caseworkers. They "stood by and did nothing," he said, "when suspicious circumstances dictated a more active role" in protecting Joshua. But "the harm was inflicted not by the state of Wisconsin, but by Joshua's father." States only have a duty of protection for persons in custody-like prisoners or children in foster homes. Joshua had been in the county's custody for three days. But caseworkers returned him to Randy DeShaney, Rehnquist said, "in no worse position" than before his beating. "Under these circumstances," he wrote, "the state had no constitutional duty to protect Joshua against his father's violence."

Three justices dissented. Justice William Brennan read the record differently than Rehnquist. Reports from police, neighbors, doctors, gave the caseworkers, he said, "ever more certain knowledge

that Joshua was in grave danger." Their failure to protect Joshua made him a prisoner, Brennan said, "within the walls of Randy DeShaney's violent home." They should not escape liability, he added, only because "they were not the ones who dealt the blows that destroyed Joshua's life."

Justice Harry Blackmun repeated his words at the argument. "Poor Joshua!" he said. He accused the majority of "sterile, formalistic reasoning" that could have justified the nineteenth-century fugitive slave laws. Blackmun said the Fourteenth Amendment can be read narrowly or broadly. "I would adopt a `sympathetic' reading," he said, "one which comports with dictates of fundamental justice and recognizes that compassion need not be exiled from the province of judging."

Page 49

Child abuse is a serious problem. More than two million cases of abuse and neglect are reported every year. Caseworkers have tough jobs, and they make hard decisions. When they make mistakes, children suffer, even die. But who should pay for these mistakes? In Joshua's case, the justices drew a line on the government's side. But there is no bright line that can decide every case. Judges must still balance the Constitution with human compassion. It's not an easy job.

EDITED SUPREME COURT OPINIONS

DeShaney v. *Winnebago Cty. Soc. Servs. Dept.*

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioner is a boy who was beaten and permanently injured by his father, with whom he lived. Respondents are social workers and other local officials who received complaints that petitioner was being abused by his father and had reason to believe that this was the case, but nonetheless did not act to remove petitioner from his father's custody. Petitioner sued respondents claiming that their failure to act deprived him of his liberty in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. We hold that it did not.

The facts of this case are undeniably tragic. . .

. . .

Page 50

. . . But nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. The Clause is framed as a limitation of the State's power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the State itself to deprive individuals of life, liberty, or property without "due process of law," but its language cannot fairly be extended to impose an affirmative

Page 51

obligation on the State to ensure that those interests do not come to harm through other means. Nor

does history support such an expansive reading of the constitutional text. . . . Its purpose was to protect the people from the State, not to ensure that the State protected them from each other. The Framers were content to leave the extent of governmental obligation in the latter area to the democratic political processes.

Consistent with these principles, our cases have recognized that the Due Process Clauses generally confer no affirmative right to government aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual . . . If the Due Process Clause does not require the State to provide its citizens with particular protective services, it follows that the State cannot be held liable under the Clause . . .

Supreme Court, U.S.
FILED
JUL 10 2002
OFFICE OF THE CLERK

(2)

No. 01-1834

IN THE

SUPREME COURT OF THE UNITED STATES
October Term, 2001

ANDREW C. SCHIFFER,
Petitioner,

vs.

VILLAGE OF HASTINGS-ON-HUDSON, HASTINGS-ON-HUDSON POLICE DEPARTMENT, COUNTY OF WESTCHESTER, POLICE OFFICERS RICK WHITE ANDREW HAYDEN, WAYNE PIETROPOLO, DAVID DOSHIN, DISH, O'SULLIVAN, OTHERS as of yet unknown, included as John/Jane Does Numbered 1 to 10 individually,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

SUPPLEMENTAL BRIEF OF PETITIONER

ANDREW C. SCHIFFER, *Pro Se*
ROUTE 8, PO BOX 503
Speculator, NY 12164
518 548-6360

Jul 5, 2002

5 pp

No. 01-1834

SUPPLEMENTAL BRIEF OF PETITIONER

This supplemental brief "calling attention to new cases . . ." (*Rule* 15.8) is impelled by the Jun 26, 2002 express waiver of the respondents' "right to file a brief in opposition". Respondents confirmed that neither their counsel nor the Court needs to address any (since there is no) "perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted" (*Rule* 15.2) to help answer the issues since the Constitution mandates judgment only on the "actual case": *the* one and only "bedrock requirement". *Raines et al.* v. *Byrd, et al.*, 1997, 521 US 811, 818.

> As aptly stated by Judge Learned Hand in *Masses Publishing Co.* v. *Patten* (DC) 244 F 535, 540: "One may not counsel or advise [or sponsor] others to violate the law . . . [since doing so] cannot by any latitude of interpretation be a part of that public opinion which is the final source of government in a democratic state."
>
> *Dennis* v. *United States*, 1951, 341 US 494, 571-572.

Judges personify the justice system . . . so vital to its effective functioning. *Mazzei*, 81 NY2d 568, 571-572.

NEW CASES

On Jul 1, 2002, the NY Hon. US District Judge Jed Rakoff became the first federal trial judge to rule that federal death penalty is unconstitutional as "state-sponsored murder of innocent human beings" since death-row inmates are deprived of due-process

rights to protect against "undue risk" that innocent humans would be killed, not exonerated instead. Prosecutors planned to seek the death penalty upon conviction of drug dealers set for trial in New York on Sep 3, 2002 for killing a government informant.

On Jun 20, 2002, in *Atkins* v. *Virginia,* this Supreme Court ruled that a state executing mentally retarded is unconscionable since punishment is "excessive" and prohibited by Amend. 8 if not graduated and proportioned to the offense (*Weems* v. *United States,* 217 US 349, 367), that an excessiveness claim is judged by the currently prevailing standards of decency (*Trop* v. *Dulles,* 356 US 86, 100-101), and that proportionality review under such evolving standards should be informed by objective factors to the maximum possible extent (*Harmelin* v. *Michigan,* 501 US 957, 1000): the clearest and most reliable of which is legislation enacted by the nation's legislatures (*Penry* v. *Lynaugh,* 492 US 302, 331).

These cases ruled that death penalty is unconstitutional even when killing is by us normal, educated and sane humans and thus all the more so when killing is by the mentally retarded humans.

The Missouri Supreme Court temporarily halted the Jun 5, 2002 execution of juvenile offender Christopher Simmons, arguing that the decision in *Atkins,* when rendered, should apply to juveniles who, just like the mentally retarded, are also a group requiring special protection in the legal system.

SELF-EVIDENT ARGUMENT

Killings *end* the problems of the killed. Raping and/or beating *begin* the problems of the raped and/or beaten. This manifest reality of rule of law, order and government regulating life is *not equal* protection of laws for both the killer and the killed, the rapist and the raped, and the beater and the beaten. *Instead*, it is an *unequal* (*biased*) protection of laws *for* the killer, the rapist, and the beater *against* the killed, the raped and the beaten. What do you think?

Didn't *DeShaney* and *Schiffer* (case at bar) help make the rights of policemen (lawmen) and thus laymen to rape, beat and sponsor manifest crimes (violations of laws) the "*unalienable* [Creator-endowed] Rights [to] Life, Liberty, and the Pursuit of Happiness [from crimes]" their Constitutionally secured rights to enjoy?

The Constitution contemplates that, in addition to the objective evidence (*Harmelin, supra*), this Supreme Court will also bring its own judgment to bear by asking whether there is reason to agree or disagree with the judgment reached by the citizenry and its legislators. *Coker* v. *Georgia*, 433 US 584, 597.

Do the new cases inspire this Court's dormant *ethos* to use due process of law for *equal* protection of laws to establish Justice for All to help *prevent* (*not promote*) criminal[, civil and tort] wrongs against the innocents?

Are we all hostages to our very own home-grown laws and legal system that still impel our Courts of law to overlook the difference between human rights and human wrongs when they stop even manifestly lawless criminals from asking *why* our very own Judges *hurt*

both the violators (conspirators) and the violated by helping them enjoy crimes? Don't such laws make this Court revere illogical reasoning to help perpetuate (not learn from) experiences (mistakes), stay hostage to and thus still "forgive and forget" the past, legally?

Aren't the new cases further foolproof proof of the inevitability of our own justice system to catch up with the moral sensibilities of the international human rights standards and make such manifest history, history, before it makes us humans history, worldwide?

CONCLUSION

May it please the Court to not end due process of law for *equal* protection of the laws *until* a court: renders *the* judgment on the "actual case" that decides the fate of litigants and disposition of property (*Raines* and *Mazzei*), consecrates the "*unalienable* [Creator-endowed] Rights [to] Life, Liberty, and the Pursuit of Happiness [for the common good (not evil) of all]" (*Declaration of Independence*), Constitutionalizes lawfulness (*ethos*) that helps violators enjoying *conspiracy* (outlawed by *Dennis*) first cause and perpetuate lawlessness (*pathos*) and then abuse Judges as *honored* safe havens and the *dishonored* violated as *deprived* scapegoats under rule of law, order and government, worldwide?

Jul 5, 2002

Respectfully submitted,

ANDREW C. SCHIFFER, *Pro Se*
ROUTE 8, PO BOX 503
Speculator, NY 12164
518 548-6360